Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Children's Television Obligations Of Digital Television Broadcasters	)	MM Docket No. 00-167
	)	

REPLY TO OPPOSITION

Children Now, American Psychological Association, American Academy of Pediatrics, Action Coalition for Media Education, American Academy of Child and Adolescent Psychiatry, Benton Foundation, National Institute on the Media and the Family, National PTA, and Office of Communication of the United Church of Christ, Inc. ("Children's Media Policy Coalition" or "Coalition") reply to the Opposition filed by Fox Entertainment Group, Inc., NBC Universal, Inc., and Viacom (the "Networks"). Specifically, the Coalition urges the Commission to reject the Network's interpretation of the 50% limit on repeats and its argument that the Commission should rescind the limit on preemptions.

I. THE NETWORK'S INTERPRETATION UNDERMINES THE COMMISSION'S GOAL TO INCREASE THE AMOUNT OF CORE PROGRAMMING AND ENSURE BROADCASTERS DO NOT "SIMPLY REPLAY CORE PROGRAMS"

To ensure that children, no less than adults, benefit from digital broadcasters' increased programming capabilities, the Commission revised the 1996 children's television processing guideline to provide that a broadcaster who chooses to multicast will have an increased core programming benchmark roughly proportional to the additional amount of programming it chooses to provide.[1] Because of its "concern[] that digital broadcasters do not simply replay the

[1] *Children's Television Obligation of Digital Television Broadcasters,* 19 FCC Rcd 22943, 22950 (2004) ("*DTV Order*").

same core programming in order to meet [its] revised processing guideline,"[2] the Commission decided to require that "at least 50 percent of core programming not be repeated during the same week to qualify as core."[3] The Coalition, concerned that the language could be interpreted contrary the Commission's goal, asked the Commission to clarify that the 50% limit applies to the increase in the amount of core programming needed due to multicasting, rather than the total amount of core programming.

The Networks oppose the Coalition's clarification and argue for a misinterpretation that is inconsistent with the Commission's goal. They argue that "[t]he plain meaning of the new rule is to set a 50 percent limit on repeats of core programming on digital channels in the aggregate."[4] Moreover, they argue that interpreting the rule to apply to only a broadcaster's commensurate increase in core programming will impede the digital transition. Under its interpretation, "if a broadcaster presents 3 hours of programming on its main channel with no repeats, it could then save substantial costs by repeating *all of its core programming* on a second digital channel."[5]

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[2] *Id.* at 22952.
[3] *Id.*
[4] Fox Entertainment Group, Inc., NBC Universal Inc., and Viacom, Opposition to Petition for Reconsideration, MM Dkt. No. 00-167, filed March 23, 2005, at 3 ("Networks Opposition")
[5] *Id.* at 4 (emphasis added). In footnote 8 on page 3 of the Networks Opposition, the Networks rely on *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003) to argue that the Commission violated the Administrative Procedure Act by giving inadequate notice in the *Children's Television Obligations of Digital Television Broadcasters*, Notice of Proposed Rulemaking, 15 FCC Rcd 22946 (2000) ("*NPRM*"). This reliance is misplaced. In *Sprint*, the FCC revised a rule without issuing a new NPRM prior to promulgating the rule. 315 F.3d at 374. Unlike *Sprint*, the Commission has issued a NPRM to alert interested persons as to the "the terms or substance of the proposed rule [and] a description of the subjects and issues involved." 5 U.S.C. § 553 (b)(3). The limits on repeats is the "logical outgrowth" of the NPRM which asked for comments not only on proposals to increase the amount of core programming proportional to a digital broadcaster's increase in programming services, *e.g.*, *NPRM* 15 FCC Rcd at 22953, but also asked, "how should we address how core programming should be distributed on the broadcaster's channels?" *NPRM* 15 FCC Rcd at 22954. *See Public Service Comm. of the*

While simply repeating the same programming would undoubtedly be cheaper than any additional core programming, it would completely undermine the Commission's goal to increase the amount of educational programming available to children.[6] The 50% limit on repeats is meant to avoid precisely a mere recycling of core programming.

If anything, the Commission's 50% limit with respect to multicasting broadcasters is generous and departs from its related policies to make the transition to digital television less burdensome on broadcasters. In the case of commonly owned stations, the FCC concluded that these stations cannot simply repeat the core programming from one station onto another because "it would be inconsistent with th[e] Congressional objective [to increase the amount of educational and informational programming available to children] to permit commonly owned stations in a market to rely on the same programming to meet the [core programming] obligations."[7] Multicasting broadcasters are in a position similar to a broadcaster who owns multiple stations in the same television market: both provide multiple program streams to the same market. While consistency with the FCC's policy in the context of common ownership would require a total ban on repeating core programs for multicasting digital broadcasters, the FCC instead balanced the needs of children with the desire to give broadcasters flexibility in transitioning to digital television, and found a 50% limit to be reasonable.[8]

District of Columbia v. FCC, 906 F.2d. 713, 717-18 (D.C. Cir. 1990) (holding that the final rule providing for unified treatment for Class A and Class B carriers was the logical outgrowth of the NPRM despite stating in the NPRM that the FCC's primary goal was to conform to the Uniform System of Accounts which treated these two classes differently because the FCC had more than one goal, and the plaintiff had actual notice of the scope of the proceedings and did not show what additional arguments it would make with another round of public comments).

[6] *DTV Order*, 19 FCC Rcd at 22950-51.

[7] *2002 Biennial Regulatory Review*, Report & Order, 18 FCC Rcd 13620, 13690 (2003).

[8] The Coalition urges the Commission to revisit this 50% limit once the transition to digital is complete and the need for allowing repeats is diminished. The Networks attempt to distinguish between a multicasting broadcaster and two stations under common ownership and correctly note

The Commission should reject the Network's arguments and clarify this rule to more clearly reflect its intent to ensure children have access to an increased amount of educational programming by permitting a broadcaster to repeat only half of its core programming to fulfill its commensurate increase under the guideline. This approach is necessary to counter the market disincentive to short-change the educational needs of children, and, at the same time, it gives broadcasters adequate flexibility and acknowledges that children may benefit from viewing an educational program more than once.[9]

II. THE LIMITS ON PREEMPTIONS IS FLEXIBLE AND MORE THAN ADEQUATE TO ACCOMMODATE CHILDREN'S PROGRAMMING AND SPORTS

To ensure educational and informational children's programs that are "regularly scheduled" are, in fact, regularly broadcast, the Commission has limited the number of times a broadcaster may preempt core programs and still count them as core. In its Opposition, the Networks repeat their standard arguments that this limit on preemptions is inflexible and makes it impossible for broadcasters to accommodate both sports and children's programming.[10] However, the Commission should reject these arguments.

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that a licensee must comply with the processing guidelines separately. Networks Opposition at 5. However, the Networks do not explain why limiting repeats for multicasting broadcasters and common ownership situations should be treated differently.

[9] As discussed in, The Children's Media Policy Coalition, Opposition to Petition for Reconsideration, MM Dkt. No. 00-167, filed March 23, 2005, at 5 ("Coalition Opposition"), the Commission has already rejected the broad argument that the revised processing guideline will serve as a disincentive. *DTV Order*, 19 FCC Rcd at 22953-54. The Coalition supports this conclusion.

[10] Networks Opposition at 6-7. The Networks also suggest that the limit on preemptions is somehow "constitutionally suspect." *Id*. at 6. However, as the Coalition has already argued, the processing guideline is consistent with the Constitution and the limit on preemptions is merely a clarification of what counts as "regularly scheduled" within those guidelines. Coalition Opposition at 7.

The Commission's limitation on preemptions is sufficiently flexible. It only requires that a broadcaster preempt no more than 10% of the episodes of a core program.[11] The Mass Media Bureau's review of station preemption practices from 1997-1999 shows that, as long as station preemption practices have not deteriorated, most stations should have no difficulty complying with the 10% preemption limit.[12] Most importantly, nothing in the processing guideline or the 10% preemption limit requires broadcasters to air children's programming exclusively on Saturday mornings. In fact, broadcasters continue to air children's programming on Saturday mornings despite urging from Congress and the Commission to air children's programming on different days and at different times of the week,[13] the fact that Nielsen data suggests children's programs aired at times other than Saturday mornings would reach a larger audience,[14] and their self-confessed difficulties accommodating both children's programming and Saturday morning sporting events.[15] In short, the inflexibility lies not in the Commission's limit on preemptions, but with broadcasters.[16]

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[11] *DTV Order*, 19 FCC Rcd at 22958.

[12] *Three Year Review of the Implementation of the Children's Television Rules and Guidelines, 1997-1999*, at 2 (2001) (finding that "[t]he average preemption rate for all stations for core programs since the core programming requirement has been in effect is approximately 5.4 percent. The preemption rate for affiliates of the three largest networks (ABC, CBS, and NBC) is approximately 9.8 percent.") (footnotes omitted).

[13] S. REP. NO. 101-227, at 8 (1989); *Petition of Action for Children's Television (ACT) for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children's Programming and the Establishment of a Weekly 14-Hour Quota of Children's Television Programs*, 50 FCC 2d 1, 8 (1974).

[14] *See* NIELSEN MEDIA RESEARCH, *2000 Report on Television*, at 14 (2000).

[15] *E.g.*, The Walt Disney Company, Petition for Reconsideration, MM Dkt. No. 00-167, filed Feb. 2, 2005, at 14; Networks Opposition at 7.

[16] Moreover, as the Coalition stated in page 8 of its Opposition, this already flexible limit can be made more flexible if the Commission adopts the proposal to allow broadcasters to calculate preemptions on an annual, rather than a 6-month, basis. The Coalition endorses this proposal because it believes that this modest modification will allow broadcasters to offer uninterrupted coverage of major sporting events while still offering the scheduling predictability necessary for children and parents to locate core programming. Coalition Opposition at 8.

Because the limit on preemptions is reasonable and flexible, the Commission should reject the Network's calls to rescind it. In addition, the Commission should clarify that the rule applies on a per-program basis and not to a broadcaster's total amount of core programming.[17]

CONCLUSION

As outlined above, the Commission should reject the Network's attempts to undermine the children's television obligations of digital television broadcasters and should adopt the Coalition's clarifications in a timely manner.

Respectfully Submitted,

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[17] The Children's Media Policy Coalition, Petition for Reconsideration, MM Dkt. No. 00-167, filed Feb. 2, 2005 at 10-11. The interpretation offered by the Commission Staff present at the Brown Bag Lunch presentation applied the preemption limit on a per-program basis. Dow, Lohnes, & Albertson, PLLC, Ex Parte Communication, MM Dkt. No. 00-167, filed Jan. 14, 2005.

CERTIFICATE OF SERVICE

I, Brian Stone, hereby certify that a copy of the Reply filed by the Children's Media Policy Coalition, by its attorney, the Institute of Public Representation, has been served by first-class mail, this 5th of April, 2005 on the following party:

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